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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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**FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
)
Application by Ameritech Michigan)
Pursuant to Section 271 of the)
Telecommunications Act of 1996 to)
Provide In-Region InterLATA)
Services in Michigan)

CC Docket No. 97-137

REPLY

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REPLY

Sprint Communications Company L.P. ("Sprint"), by its attorneys, hereby submits the following reply in support of its petition to deny the above-captioned application of Ameritech Michigan ("Ameritech").

SUMMARY

Sprint and other commenters have already filed detailed submissions demonstrating many of the reasons why Ameritech's application must be denied. The opposition comments of these private parties have been confirmed by the two governmental parties to this proceeding -- the Michigan Public Service Commission ("MPSC") and the Department of Justice. These reply comments are submitted for the limited purposes of highlighting (1) several areas in which the Justice Department and the MPSC submissions demonstrate that Ameritech has failed to satisfy the statutory prerequisites for interLATA entry; and (2) the critical need for performance benchmarks and measures as part of the Section 271 process going forward.

I. THE SUBMISSIONS OF BOTH THE JUSTICE DEPARTMENT AND THE MPSC ESTABLISH THAT AMERITECH'S APPLICATION IS DEFECTIVE IN SEVERAL AREAS.

As part of its Section 271 decisionmaking process, the Commission is required to consult with both the Attorney General and the relevant state PUC. See 47 U.S.C. § 271(d)(2). Their respective roles and the weight they are to be accorded differ, but each can provide material assistance to the Commission in implementing Section 271. Here, both the Michigan PSC and the Department have aided in developing the factual record of Ameritech's non-compliance with the statute. These areas are discussed in Section I.A. below.

However, because the Commission has exclusive authority to grant or deny Section 271 applications, see 47 U.S.C. § 271(d)(3), it should be uncontroverted that only the FCC has ultimate authority to construe the statute and apply it. Thus, questions of law remain within the exclusive ambit of the Commission. There is at least one critical area in which the Department and the MPSC have affirmatively found compliance with the statute based upon a controversial, and in Sprint's view, erroneous interpretation of Section 271. This construction of the "predominantly its own facilities" clause is discussed in Section I.B., below.

A. The Governmental Parties Agree as to Ameritech's Failure to Comply in a Number of Areas.

As noted above, both the Michigan Public Service Commission and the United States Department of Justice have found that Ameritech has not yet demonstrated compliance with Section 271.

Perhaps most significantly, the Department has concluded that Ameritech has yet to satisfy the competitive checklist and further that the local markets in Michigan have yet to be irreversibly opened to competition. Supporting these overarching conclusions lie specific findings of non-compliance.

First, Section 271 requires applicant BOCs to offer unbundled local transport and unbundled local switching. Both the DOJ and the MPSC acknowledge that Ameritech has failed to provide either of these essential elements. In the case of the MPSC, it has noted that Ameritech's refusal to provide shared transport means that basic issues regarding the BOC's provision of unbundled transport and switching remain unresolved.¹ The Department has put it more succinctly: "Ameritech is not 'providing' unbundled local switching or unbundled local transport as either a legal or a practical matter" ² On this basis alone, the application must be dismissed.

Second, the Department has found Ameritech's performance plainly inadequate to date with respect to OSS. The Department's submission makes clear that the application is simply premature in the context of the complex tasks remaining in this area.³

¹ See Comments of MPSC at 37-40.

² Justice Department Evaluation at 11. In addition to Ameritech's failure to provision these elements on a reliable basis, the Department has found Ameritech's refusal to allow CLECs to collect the access charges earned to be inconsistent with the Act's requirements.

³ Id. at 21-24.

Similarly, the MPSC concluded that "it is not possible to tell whether Ameritech has met this requirement of the Act" because "performance standards do not exist by which Ameritech's performance can be judged."⁴ Moreover, as discussed in Section II, infra, numerous OSS problems warrant dismissal of Ameritech's application regardless of whether performance standards are introduced.

Dismissal of Ameritech's application is also warranted because Ameritech has not complied with the pricing provisions of the Act. As noted by the MPSC, the interim prices for several elements and services were calculated without reference to either the Communications Act or the Michigan Telecommunications Act.⁵ Some prices, in fact, have not been set at all and must "be determined at some future date."⁶ As the Department explains, CLECs cannot be rationally expected to "commit their resources to enter a state on a large scale if the economic conditions they will face are highly uncertain and there are incentives for backsliding on the part of the BOC once interLATA relief is granted if final prices have not already been set."⁷

The areas enumerated above are not exhaustive. The MPSC also declines to conclude that Ameritech complies with checklist

⁴ MPSC Comments at 24, 28.

⁵ Id. at 8.

⁶ Id.

⁷ Justice Department Evaluation at 42.

item (vii), nondiscriminatory access to 911 and E911 services. And the Justice Department has appropriately expressed grave concern with respect to the disparately poor quality of end office trunking Ameritech has provided to CLECs.⁸ We are not here concerned with the cumulative effect of these problems, although certainly that itself is dramatic. Rather, the guiding principle here must be the statute's requirement that "each" item of the checklist, as well as all other prerequisites of Section 271, be satisfied before an application can be granted.

B. The Commission Owes No Deference to the Department's Conclusion that Brooks Fiber Provides Services Predominantly Over Its Own Facilities.

In its Evaluation, the Justice Department concludes that Brooks Fiber provides service predominantly over its own facilities. The Commission should reject this conclusion as both unsupported and incorrect.⁹

The Department's analysis of the predominance issue is confusing and flawed. The Evaluation¹⁰ observes that Brooks "provides significant switching and transport of its own, separate from Ameritech, to serve all of its customers." It then goes on to state that Brooks also has "a substantial share of its

⁸ Id. at 24-27.

⁹ The MPSC finding that Brooks Fiber relies principally on unbundled loops to provide both residential and business service is nowhere contested. Rather, the legal conclusion which flows from this fact is at issue.

¹⁰ See id. at 6

own local loops for both business and residential customers."¹¹ Based on these facts, the Department concludes that Brooks Fiber is predominantly facilities-based and that the Department need not reach the question of whether unbundled loops qualify as a CLEC's "own" facilities under Track A.¹²

Given this analysis, the only possible basis for the Department's predominance finding is that a carrier need only have a "substantial share of its own loops" (however "own loops" are defined) accompanied by independent ownership of switching and transport to meet the Track A standard. Less than 25% of Brooks Fiber's local customers are served by loops owned by the CLEC.¹³

The Department does not mention the standard it applied to reach its predominance finding. If the determination was based on overall investment, it does not explain how the analysis was performed. In any case, Sprint urges the Commission to interpret the Track A standard to require predominant ownership of loops, a finding that cannot be made based on 25% ownership.¹⁴ A separate predominance finding for loops is critical to the proper implementation of Section 271. Indeed, as the Commission is well

¹¹ Id.

¹² See id. at 7 n.11.

¹³ See Comments of MPSC at 10.

¹⁴ See Sprint Petition to Deny, CC Docket 97-121 at 9-13 (explaining meaning of "predominantly")

aware, the BOCs' control of local loops is probably the single most important barrier to local entry. As Carl Shapiro¹⁵ and Marius Schwartz¹⁶ have explained, sunk investment in the local market (of which loop construction is the most obvious and important example) is the best indication that the market is irretrievably opened to competition (the public interest standard proposed by the Department as well as Sprint). Finally, the emphasis on cable entry (the only source of an independent wireline loop) in the legislative history of Section 271 indicates that Congress expected that independent control over the loop would be an important aspect of a predominance finding.

In sum, the Department reached its conclusion that Brooks Fiber is predominantly facilities-based either based on a mistaken understanding of the extent of Brooks Fiber's loop facilities¹⁷ or based on an unsupportable interpretation of the

¹⁵ See Shapiro Aff. at 11 ("Whether looking at actual or potential competition in local-exchange markets, facilities-based competition is especially important. CLECs with their own facilities have made substantial sunk investments to service the market, and are thus committed to an ongoing market presence. . . . Investments in alternative local loop facilities would be especially significant, as these facilities would represent a lasting commitment to the local market. Congress expected these investments would be made, and repeatedly gave the example of cable facilities."); at id. 13 ("the economic concept of sunk costs embodies the very notion of irreversibility [of open markets]").

¹⁶ See Schwartz Aff. at ¶ 174.

¹⁷ This alternative seems very unlikely, given that the Department cites in its Evaluation to pleadings that only confirm that Brooks Fiber's customers are predominantly serviced via unbundled loops. See Justice Department Evaluation at 6 n.10 (citing to (1) the Ameritech Brief at 10, which does not attempt to determine the percentage of

term predominantly. In either case, the Commission should reject the Department's conclusion and find that Brooks Fiber does not provide service predominantly over its own facilities.¹⁸

II. THE COMMISSION SHOULD ESTABLISH PERFORMANCE BENCHMARKS AND MEASURES AND REQUIRE BOC COMPLIANCE AS A PRECONDITION FOR SECTION 271 APPROVAL.

The record before the Commission also makes clear the value of performance standards to improve the Section 271 process and to better measure the consumer welfare effects of BOC entry. Both in the SBC Oklahoma Section 271 application proceeding and in the instant Ameritech Michigan Section 271 proceeding, the Department of Justice has made a convincing argument in favor of Commission-established performance benchmarks for BOC checklist compliance. As explained in detail by Dr. Schwartz, performance standards are an essential aspect of the Section 271 process. Sufficient performance benchmarks and measures¹⁹ that are

Brooks Fiber's loops that are its "own;" (2) Brooks Fiber's Opposition at 7, 9, which states that Brooks must rely on Ameritech for 61% of its business and 90% of its residential loops; and (3) the MPSC Consultation at 10, which states that 75% of Brooks customers are served over unbundled loops.

¹⁸ Of course, such a conclusion must be based on the proper understanding of the status of unbundled network elements under Section 271(c)(1)(A). See Sprint Petition to Deny at 6-12.

¹⁹ For the purposes of this discussion, Sprint uses the phrases "performance benchmark" and "performance measure" as defined in the Justice Departments Addendum filed in CC Docket 97-121 at 4-5. Sprint clarifies, however, that while it agrees with the Department that these are effective post-entry enforcement mechanisms, BOCs must be required to meet performance benchmarks as a condition to Section 271 approval. Such compliance and the proof that new entrants

adequately enforced will help to assure that the local market has been irreversibly opened to competition. The Commission should therefore establish performance benchmarks and measures and, once they have been established, make compliance with those regulations a condition precedent for Section 271 approval.

It is important to emphasize that, as explained in Sprint's comments, Ameritech's Section 271 application for Michigan is deficient on its face and performance standards are therefore unnecessary in the instant proceeding. Indeed, the MPSC is incorrect in its assertion²⁰ that performance standards are even necessary to determine whether Ameritech is providing non-discriminatory access to its OSS. As demonstrated in the comments and expert affidavits, Ameritech is not even providing to CLECs on a commercial, let alone non-discriminatory, basis (1) its pre-order electronic interface for telephone number and due date selection,²¹ (2) its maintenance and repair electronic interface,²² (3) the order completion and order jeopardy subfunctions of the ASR interface for ordering and provisioning UNES (no Ameritech EDI interface even exists for

can function when those performance benchmarks have been met are critical to the effectiveness of the benchmarks.

²⁰ See Comments of MPSC at 18.

²¹ See Reeves Aff. at ¶¶ 7-8. The only one of the electronic pre-ordering interface subfunctions currently being provided is the electronic customer record retrieval capability. See Comments of MPSC at 17.

²² See Reeves Aff. at ¶ 15; Comments of MPSC at 18.

ordering/provisioning UNES),²³ (4) any "UNE platform" interfaces,²⁴ or (5) electronic interfaces to support resale of DID, Centrex, ISDN, multiline business with hunting or private lines.²⁵

Nor can it be said that lack of CLEC interest has caused these failures. For example, Sprint is currently negotiating with Ameritech to establish an interim electronic interface for telephone number and due date selection.²⁶ AT&T reports that it has made repeated requests for UNE platform interfaces and for electronic interfaces to support resale of DID, Centrex and other business services.²⁷ Even where electronic interfaces have been provided, they cannot support the level of activity required in a

²³ See Comments of MPSC at 18.

²⁴ Preliminary testing of a scaled back version of the UNE platform interface between AT&T and Ameritech began on May 28, 1997. See Affidavit of Susan L.Z. Bryant, AT&T Appendix Vol. III at ¶ 48 ("Bryant Aff.").

²⁵ See Affidavit of Timothy M. Connolly, AT&T Appendix Vol. V at ¶ 168 ("Connolly Aff."); Affidavit of Samuel King, MCI Exhibit D at ¶¶ 34, 115-118. It should be noted that Timothy Connolly indicates that "[v]irtually all of USN's Centrex orders are submitted manually to Ameritech" (Connolly Aff. at ¶ 169), thereby implying that USN may, in a few isolated instances, have used the electronic interface it is attempting to develop for Ameritech to resell Centrex.

²⁶ See Reeves Aff. at ¶ 10.

²⁷ See Connolly Aff. at ¶ 167 (explaining that Ameritech has not provided AT&T with the information necessary to resell complex business services "despite AT&T's repeated requests"); Bryant Aff. at ¶¶ 33-57 (describing AT&T's unsuccessful attempt, beginning in May of 1996, to establish UNE platform interfaces).

competitive market.²⁸ In short, Ameritech is not even close to providing OSS access that could support significant competitive entry.

But while performance benchmarks and measures may be academic for the instant proceeding, they will be an important mechanism for evaluating less obviously deficient Section 271 applications. Pre-approval performance requirements will make the review of BOC Section 271 applications simpler and more effective. The scope and number of factual disputes, in which the BOC will always have an informational advantage over new entrants and regulators, can be limited.²⁹ Moreover, by establishing a set of parameters based on proven interconnection arrangements, the Commission can have more confidence that, once the standards have been met and significant competition has developed, others can enter and compete in the local market using the same arrangements. In this sense, the benefits of performance benchmarks resemble those of properly enforced MFN rights.

²⁸ See generally Reeves Aff. (explaining inability of Ameritech OSS to support significant competition); Connolly Aff. (asserting that a very high level of manual intervention and basic incompatibilities between the Ameritech legacy OSS systems and its MORTAL gateway have forced AT&T to scale back its entry plans substantially).

²⁹ See Schwartz Aff. at ¶¶ 128-136 (explaining effects of informational asymmetry). In fact, where performance measures are applied, there is greater information symmetry, since all parties can assume that the relevant standard is technically feasible.

As further explained by Dr. Schwartz, performance benchmarks will also "render[] post-entry safeguards - regulatory, antitrust and contractual - more effective at countering subsequent BOC incentives to degrade" interconnection arrangements.³⁰ This is because it will be much easier to test compliance with a model known to function than to establish the model when the BOC has no incentive to cooperate.

The record is full of incidents that illustrate the problems that, while likely to arise even with performance benchmarks, will be much more difficult to address in their absence. Issues such as the different methods of measuring unbundled loop provisioning used by Brooks Fiber and Ameritech³¹ and Ameritech's periodic alteration of its interface specifications and Order Status Reports³² could be addressed in a straightforward fashion if performance measures and benchmarks were in place. Of course, benchmarks must be flexible enough to accommodate new technical standards adopted by the industry. But required compliance with relatively stable benchmarks and measures will go a long toward

³⁰ See id. at ¶ 17.

³¹ See Comments of MPSC at 26-27.

³² Timothy Connolly states that Ameritech changed its interface specifications at least five times within a twelve month period. See Connolly Aff. at ¶ 172. AT&T Affiant Bryant states that Ameritech changed its Order Status Reports in March of this year to exclude all information regarding orders that are processed manually. See Bryant Aff. at ¶ 129.

establishing an interconnection environment in which regulatory enforcement is likely to much more effective.³³

While they will thus provide substantial benefits, workable benchmarks and measures will take time to develop. Even when such information is available, BOCs are likely to divulge data regarding internal performance, which is critical to setting a non-discriminatory benchmark, only reluctantly (and probably in incomplete form). Not surprisingly, for example, Ameritech's current OSS performance reports do not provide this information.³⁴ Where the BOC provides interconnection services that are not comparable to any provided internally, there will inevitably be disputes as to the appropriate benchmarks and measures of performance. Where no basis for comparison exists for BOC internally provided services, benchmarks and measures also must be stress-tested and shown to support viable entry. Without such evidence, there is no way one can be confident that the benchmarks and measures will be effective.

Thus, like much of the interconnection process, these rules require information discovery, negotiation and testing that

³³ As Dr. Schwartz emphasizes, regulation will likely be more effective in a stable environment, where established benchmarks can be applied, than where interconnection relationships have not been established and benchmarks have not been developed. See Schwartz Aff. at ¶¶ 134-148.

³⁴ See Affidavit of C. Michael Pfau, AT&T Appendix Vol. XII at ¶ 15 ("[N]ot one of the performance reports submitted by Ameritech for the timeliness, availability or accuracy of the OSS access provided to CLECs provides any information whatever regarding Ameritech's performance for its own local retail operations") (emphasis in original).

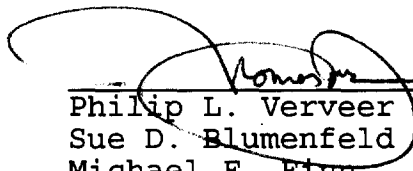
cannot be completed overnight. Notwithstanding BellSouth's and SBC's contrary argument,³⁵ as the FCC has recently found,³⁶ Congress was aware of how long it would take (especially in light of BOC resistance) to open the local market and provided regulators the statutory authority to wait until the time is right before allowing interLATA entry. Performance benchmarks and standards will help to determine when that time has come.

CONCLUSION

For the foregoing reasons, Ameritech's application must be denied.

Respectfully submitted,

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³⁵ See Comments of BellSouth and SBC at 5-7.

³⁶ See Application by SBC Communications Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services In Oklahoma, Memorandum Opinion and Order, CC Docket No. 97-121 at ¶¶ 41, 64 (released June 26, 1997) (describing the "ramp-up" period between qualifying interconnection requests and Track A compliance).

CERTIFICATE OF SERVICE

I Catherine DeAngelis, do hereby certify that copies of the foregoing Reply have been sent, via first class mail (or by hand delivery where indicated *), on this 7th day of July, 1997 to the following:

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